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IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,

Respondents.

On Writ of Certiorari to the Utah Supreme Court

BRIEF OF CERTAIN LEADING BUSINESS CORPORATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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August 19, 2002

39 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. JURY-DETERMINED PUNITIVE DAMAGES ARE INHERENTLY ERRATIC AND UNPREDICTABLE 6

A. Even When Juries Agree on Blameworthiness of Conduct, Dollar Awards Are Arbitrary and Unpredictable. 10

B. Jury Awards Do Not, and Cannot, Reflect Any Coherent Theory of Deterrence. 15

C. Jury Punitive Damage Awards Are Inherently Subject to Arbitrary and Improper Influences. 18

II. JURIES ARE UNSUITED TO PUNISH AND REGULATE ALLEGED EXTRATERRITORIAL MISCONDUCT 24

III. DUE PROCESS REQUIRES SEARCHING REVIEW OF PUNITIVE AWARDS UNDER THE *GORE* GUIDEPOSTS 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

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INTEREST OF *AMICI CURIAE*[1]

The undersigned *amici curiae*[2] are leading manufacturing, energy, pharmaceutical and financial services companies engaged in commerce throughout the United States and the world. In this era of expansive tort litigation against corporations and even entire industries, *amici* have all defended against lawsuits seeking millions and sometimes billions of dollars in jury-imposed punitive damages. *Amici* have a critical interest in the development of the constitutional law limiting such awards. As large businesses engaged in geographically widespread commercial activities subject to the diverse laws of multiple states, *amici* have a vital stake in the enforcement of appropriate constitutional prohibitions against extraterritorial punishment and grossly excessive awards like the one in this case.

SUMMARY OF ARGUMENT

Until recently little was known about how juries decide punitive damages. The last five years, however, have seen the publication of more than a dozen important empirical studies on this subject by leading scholars in the fields of law, economics, and cognitive psychology.[3] The studies—

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than *amici curiae* made any monetary contribution to its preparation or submission.

[2] Abbott Laboratories, Wyeth, Bristol-Myers Squibb Company, Caterpillar Inc., ChevronTexaco Corporation, Connecticut General Life Insurance Co., E.I. duPont de Nemours & Company, Exxon Mobil Corporation, Halliburton Company, Johnson & Johnson, Merck & Co., Inc., Minnesota Mining & Mfg. Co., Morgan Stanley, New York Life Insurance Company, Reliant Energy Inc., and Shell Oil Company.

[3] *Amici* have previously called the Court's attention to some of this research in a brief filed in *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001), in which the Court cited several of the stud-

which collectively report on the deliberations of over 8,000 mock jurors and 600 mock juries in controlled experiments designed to investigate the way juries determine punitive damages—demonstrate that even conscientious and well-intentioned juries produce systematically erratic and unpredictable awards. The resultant risk of arbitrary and unjust punishment is a serious problem in every punitive damages case. But the potential negative consequences increase exponentially when a state purports to delegate to a single jury, ostensibly convened to decide a single case involving the claims of a local plaintiff, the task of determining the appropriate amount to punish and deter a vaguely defined "pattern" of alleged nationwide misconduct.

The authors of these studies—which appeared initially in peer-reviewed scientific journals and leading law reviews—have now published a book reviewing and synthesizing the conclusions of their combined research. *See* Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, *Punitive Damages: How Juries Decide* ("*How Juries Decide*") (2002). Their principal findings are both striking and sobering:

> Although jurors show remarkable consistency in ranking the "outrageousness" of wrongful conduct on a bounded scale (*e.g.*, a scale of one to ten), their translation of such rankings into dollar punitive awards is enormously variable and unpredictable.
>
> Contrary to commonly held belief, deliberation by groups of jurors does not moderate the unpredictability of punitive awards, but exacerbates such unpredictability, with deliberating juries returning consistently higher and more variable awards than jurors individually.
>
> Juries assessing punitive damages will not and cannot apply standard economic deterrence theories, even when specifically instructed on how to do so.
>
> Juries assessing punitive damages impose significantly varying awards in response to inappropriate factors, including the amount requested in argument by plaintiffs' counsel and bias in favor of local plaintiffs.
>
> Juries assessing punitive damages exhibit both hindsight bias and irrational attitudes towards risk, for example awarding higher punitive damages against defendants who conduct cost/benefit analyses than against those who do not.

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ies here discussed. *See* Br. of Certain Leading Business Corporations in Supp. Pet., *Cooper Industries*, No. 99-2035 (Dec. 4, 2000).

Importantly, these findings do not imply that jurors on the whole are not conscientious, intelligent, or properly motivated. Rather, they show that in the context of punitive damage decisions, juries return erratic and unpredictable dollar awards because of natural features of human cognition. As one-time decisionmakers in individual cases, juries have no ready frame of reference for translating a desire to punish blameworthy conduct into dollar punishment. Different juries consequently will assess widely divergent dollar punishment for identical conduct against identical defendants in identical cases. And such decisions are distinctively susceptible to a variety of common cognitive biases, all of which the behavioral literature has observed in other decisionmaking contexts. The inescapable conclusion of this growing body of scientific literature is that dollar awards imposed by juries in individual punitive damage cases do not reflect—and cannot be expected to reflect—commonly shared values

or objectives about either retribution or deterrence. Rather, the studies show, dollar awards are essentially arbitrary.

These findings have obvious and important implications for this case. First, they confirm that juries are poorly suited to the regulatory task of imposing punitive judgments. Jurors lack experience in setting punitive amounts, they receive no "training" beyond vague instructions that they should consider what amount would be reasonable to punish and deter the defendant, and they are rarely given more than a fraction of the information necessary for a principled determination of such a sanction. They resist application of coherent deterrence principles, and their dollar awards—being arbitrary in amount—do not even reliably measure "community outrage." Even as a vehicle for purely local regulation, the current system for awarding punitive damages risks biased and arbitrary punishment—raising serious constitutional concerns. Those concerns are magnified where, as here, a single jury punishes and regulates extraterritorially.

Second, the findings make plain that if jury-imposed punitive damages are to be allowed, their consistency, predictability, and, ultimately, their legitimacy will turn on the extent to which reviewing courts rigorously apply the guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), to ensure that the awards do not grossly exceed the amount required to vindicate legitimate state interests in punishment and deterrence. This Court has repeatedly emphasized the importance of such review,[4] but as the

[4] *See Cooper Indus.*, 532 U.S. at 436 (*de novo* appellate review "helps to assure the uniform treatment of similarly situated persons that is the essence of law itself") (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994) (judicial review required to safeguard against possibility that jury "may return a lawless, biased, or arbitrary verdict"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) ("[A]ppellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition").

decision below illustrates, that message has not always been heard. The Utah decision misapplies the *Gore* analysis, trivializing the constitutional inquiry to rationalize a facially arbitrary and excessive award. Unfortunately, a number of other recent decisions have taken a similarly lax approach. To "maintain control of, and to clarify, the legal principles,"[5] this Court should make clear that such an approach does not satisfy the constitutional standards laid down in *Cooper Industries*, *Gore*, *Oberg*, and *Haslip*.

ARGUMENT

When the Utah Supreme Court reinstated the jury's $145 million punitive damage award, it effectively appointed the jury in this case insurance regulator not only for Utah, but for the entire nation. Petitioner State Farm and other supporting *amici* have ably marshaled the legal precedents demonstrating the unconstitutionality of this decision. This brief focuses on the practical reasons those legal precedents compel reversal of the decision here, as revealed by recent scientific research on punitive damages decisionmaking.

That research demonstrates that punitive awards made by juries are inherently erratic and unpredictable, unmoored to any rational foundation, and highly susceptible to influence by arbitrary factors and cognitive biases. Their conclusions confirm the importance of this Court's precedents demanding that courts exercise serious, substantive review of punitive damages awards, to "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 20-21. Those precedents operate to minimize the risk of arbitrariness in punitive dam-

[5] *Id.* at 436 (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)).

ages awards by requiring reviewing courts to ensure that punitive damages are commensurate with the reprehensibility of the actual conduct at issue, the true, identified harm to the plaintiff, and the realistic sanctions the State might otherwise impose for comparable misconduct. The Utah Supreme Court abdicated that crucial responsibility here, producing an arbitrary and unconstitutional result. But this case only exemplifies—albeit dramatically—the arbitrariness that is inherent in virtually all punitive damage awards. Unless the Court corrects the error here, and steers other courts toward more vigorous enforcement of *Gore*'s constraining guideposts, the demonstrated flaws in juries' punitive damage decisionmaking capabilities all but guarantee that punitive damage awards will bear little or no connection to the rational purposes they are intended to serve.

I. JURY-DETERMINED PUNITIVE DAMAGES ARE INHERENTLY ERRATIC AND UNPREDICTABLE

The observation that punitive damages are erratic and unpredictable is not new. Each passing year brings reports of jury-imposed punitive awards of staggering proportions. In 1999, for example, a California jury returned a $4.8 billion punitive damage verdict against General Motors in a personal injury case.[6] Other juries assessed punitive damages ranging from $20 million to more than $200 million in at least a dozen additional cases. *Developments in the Law—The Paths of Civil Litigation*, 113 Harv. L. Rev. 1752, 1783 (2000). In 2000, a Florida jury awarded a record $145 billion in punitive damages against a group of tobacco compa-

[6] *Anderson v. Gen. Motors Corp.*, Los Angeles County Superior Court No. BC 116-926. The trial court remitted the award to the still excessive figure of $1.09 billion, and General Motors has appealed. *See* Margaret Cronin Fisk, *The Biggest Jury Verdict of 1999*, Nat'l Law J., Feb. 28, 2000, at A1.

nies,[7] and an Alabama jury awarded the State of Alabama $3.42 billion in punitive damages against Exxon in a dispute over the proper interpretation of an offshore gas lease.[8] In June of this year, a California Court of Appeal reinstated a jury-imposed punitive award of $290 million against Ford in a personal injury case arising, like the General Motors case, from a single automobile accident.[9]

The size of these jury awards dwarfs historical punitive damage awards, and the inflationary trend seems only to be increasing. A recent survey by Harvard Law School researchers Joni Hersch and W. Kip Viscusi lists over 50 punitive damages verdicts of $100 million or more since 1985.[10]

In the face of such reports, defenders of punitive damages are quick to point out that trial and appellate courts frequently reverse or reduce large punitive awards.[11] Available

[7] *Engle v. R.J. Reynolds Tobacco*, No. 94-08273, 2000 WL 33534572 (Fl. Cir. Ct. Nov. 6, 2000). The trial court refused to reduce the award, and the defendants have appealed. *Id.*

[8] *Exxon Corp. v. Dep't of Conservation and Natural Res.*, No. CV 99-2368 (Ala. Cir. Ct.). The trial court refused to reduce the award, and Exxon has appealed.

[9] *Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115 (Cal. Ct. App. 2002), *pet. for review filed* Aug. 6, 2002.

[10] Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform* ("*How Judges and Juries Perform*"), Harvard-Olin Center for Law, Economics, and Business, Disc. Paper No. 362 (May 2002) (available at http://www.law.harvard.edu/programs/olin_center/).

[11] *See* Theodore Eisenberg, Neil LaFountain, Brian Ostrum, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study* ("*Juries, Judges, and Punitive Damages*"), 87 Cornell L. Rev. 743, 777-78 & n.123 (2002); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 Harv. J. on Legis. 487, 503-08 (2001); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15, 40-44 (1998); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1115-16 (1996).

evidence suggests this may be so, at least in the aggregate. A 1986 sampling of federal product liability cases by Professor William Landes and Judge Richard Posner reported that federal appellate courts reversed or sharply reduced the awards in nine of thirteen cases in which punitive damages were appealed, a reversal rate (seventy percent) more than double the reversal rate for plaintiff verdicts not including punitive damages.[12] More extensive surveys by the Rand Corporation (1987) and the U.S. General Accounting Office (1989) likewise reported high rates of reversal or reduction, especially among larger awards.[13] And a 1993 Washington Legal Foundation study of decisions reported on Lexis and Westlaw found that fifty-four percent of jury punitive damage awards were reversed, reduced or modified.[14]

This high reversal rate, however, hardly describes an acceptably functioning system. The reversal statistics show the critical extent to which the tort system depends on judicial review by both trial and appellate courts to counteract erratic and unpredictable jury-imposed punishment. *See Oberg*, 512 U.S. at 433 n.11 (survey evidence of this type "supports the importance of judicial review of the size of punitive damages awards"). Without such review, the system as a whole would violate due process. *Id.* at 432. But the underlying error rate for punitive damages jury verdicts remains—and should remain—a matter of serious concern in every case. The high rate of disagreement between judges and juries on

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[12] *See* William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, Reg. 33 (Sept.-Oct. 1986).

[13] *See* Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings*, Report No. 3311-ICJ, Institute for Civil Justice (Rand Corporation 1987); U.S. General Accounting Office, *Product Liability Verdicts and Case Resolutions in Five States*, GAO/T-HRD-89-90 (Sept. 1989).

[14] *See* Br. of the Washington Legal Foundation as *Amicus Curiae* in Supp. of Pet., *Honda Motor Co. v. Oberg*, No. 93-644 (1994).

punitive damages stands in sharp contrast to the much lower rates of disagreement (typically around twenty percent) reported in the literature on jury verdicts generally.[15] Jury decisions on punitive damages appear uniquely prone to error.

The empirical studies collected in *How Juries Decide* strongly reinforce this conclusion. Designed and conducted by preeminent scholars in the fields of behavioral analysis of law (Professor Cass R. Sunstein of the University of Chicago), cognitive psychology (Professors Daniel Kahneman of Princeton University, David A. Schkade of the University of Texas, and John W. Payne of Duke University), jury decisionmaking (Professor Reid Hastie of the University of Chicago), and behavioral economics (Professor W. Kip Viscusi of Harvard University), the studies report the results of large-scale mock jury simulations involving, in total, over 8,000 mock jurors and 600 mock juries.[16] In controlled experi-

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[15] *See, e.g.*, Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883 (1993); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124 (1992).

[16] As noted above, these studies appeared originally in peer-reviewed behavioral journals and/or leading law reviews (cited *infra*). As disclosed in those publications, *amicus curiae* Exxon Mobil Corporation provided some of the funding for the mock jury simulations. There was, however, no control over the research or its conclusions. As the authors stated in the preface to their book summarizing the various studies:

> For financial support, we are grateful to ExxonMobil Corporation, the National Science Foundation, the Law and Economics Program at the University of Chicago, and the Olin Foundation. We are especially grateful to these institutions for the respect shown, at each and every stage, for the complete independence of the academic enterprise. The data here, as well as the opinions expressed, are the property of the authors, and those who helped fund the research exercised no control – explicit or implicit, direct or indirect – over any of its content and conclusions.

ments designed to simulate actual punitive damages decisionmaking, the researchers evaluated the quality and coherence of the jurors' decisionmaking processes. Their findings shed new and important light on *how* juries go about setting punitive damage amounts.[17] Their principal conclusion: given the open-ended nature of the punishment-setting task and natural features of human cognition that influence most jurors' approaches to it, even the most conscientious and well-intentioned juries will produce erratic and unpredictable dollar awards.

A. Even When Juries Agree on Blameworthiness of Conduct, Dollar Awards Are Arbitrary and Unpredictable.

The starting point of the analysis is a pair of groundbreaking studies by Professors Sunstein, Kahneman and Schkade evaluating whether different juries presented with identical punitive damage scenarios would assess comparable dollar punishments. In the first study,[18] the researchers provided 899 jury-eligible citizens with materials describing ten personal injury scenarios of varying degrees of reprehensibility. They asked the mock jurors to rank the scenarios on a bounded scale of one to six, by both degree of outrageousness (*i.e.*, a scale of 0 = "not at all outrageous" to 6 = "absolutely outrageous") and severity of punishment that should be imposed (*i.e.*, a scale of 0 = "no punishment" to 6 = "extremely severe punishment"), and then to specify the dollar punishment the defendant should have to pay.[19]

Sunstein et al., *How Juries Decide* ix-x.

[17] For an overview of the experimental method generally, see *How Juries Decide* 17-26.

[18] Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)* ("*Assessing Punitive Damages*"), 107 Yale L.J. 2071 (1998). A technical version of the same study, with more detailed statistical analysis, is reported in Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. Risk & Uncertainty 49 (1998). *See also How Juries Decide* 31-42.

The results were striking in several respects. Jurors showed remarkable consistency—cutting across differences in gender, race, age and education—in ranking on bounded scales both the comparative outrageousness of misconduct and the relative severity of punishment they believed should be imposed. The researchers conclude from this finding that moral judgments about misconduct (at least in the personal injury field) are widely shared.[20] But when it came to translating those shared moral judgments into dollar punitive awards, the consensus broke down. Dollar awards for iden-

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[19] As part of each scenario, the mock jurors were also provided information about the compensatory damages (in all cases $200,000) and the size of the defendant, and were given standard jury instructions explaining the punitive and deterrent purposes of punitive damages. *Assessing Punitive Damages*, 107 Yale L.J. at 2146-47.

[20] This is not to say that jurors perform well in determining whether conduct they would rank as blameworthy passes the *legal* threshold for punitive damages. The results of another large scale mock jury study conducted by Professors Hastie, Schkade and Payne show that at least in the area of non-intentional torts—where the law generally allows punitive damages for negligent conduct only if it rises to the level of "recklessness"—jurors had great difficulty deciding the liability issues correctly. Professor Hastie and his colleagues asked over 120 randomly-selected mock juries to decide liability for punitive damages in case scenarios drawn from decisions in which appellate courts had held that as a matter of law the facts did not show the recklessness that would permit a punitive damages award. Over sixty-seven percent of the mock juries nevertheless would have awarded punitive damages on the very same facts. *See* Reid Hastie, David A. Schkade & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 Law & Hum. Behav. 287, 292-93 (1998). Juries showed poor comprehension of jury instructions carefully delineating the legally established recklessness/negligence distinction and substituted their own (incorrect) intuitions instead. *Id.* at 294-95, 307-08; *see also* Reid Hastie, David A. Schkade & John W. Payne, *Reply to Vidmar*, 23 Law & Hum. Behav. 715 (1999) (answering criticisms); *How Juries Decide* 77-95.

tical scenarios involving identical harm and identical defendants were enormously variable and unpredictable. *Assessing Punitive Damages*, 107 Yale L.J. at 2100-03.[21]

The researchers classify this inability to translate shared outrage into consistent dollar awards as an instance of the commonly observed cognitive problem of "magnitude scaling without a modulus." *Id.* at 2106-07. In substance, jurors lack a reference point (or "modulus") that would enable them coherently to map commonly shared moral judgments about outrageousness and appropriate severity of punishment onto an unbounded dollar scale. Erratic and unpredictable dollar awards naturally follow.

A follow-on study by Sunstein, Kahneman and Schkade carried the same experiment forward to deliberating juries.[22] Instead of asking 899 mock jurors to rank scenarios and assign dollar punitive awards individually, this study asked approximately 3,000 mock jurors to perform the task first individually and then as members of approximately 500 deliberating juries. The researchers hoped to determine whether the process of jury deliberation would moderate the variability of dollar punitive awards determined by jurors individually.

This second study produced results even more striking than the first. The results for individual jurors replicated (and thereby validated) the earlier results. Contrary to commonly held expectations, however, the process of jury delib-

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[21] The researchers also found (as real-world experience confirms) that jurors returned significantly higher dollar punitive awards on average against larger companies than they did against smaller ones. *Assessing Punitive Damages*, 107 Yale L.J. at 2105; *How Juries Decide* 40. For the present discussion, however, their more important finding was that different jurors made enormously variable punitive damages awards against the *same* defendants in the *same* cases.

[22] David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift* ("*Deliberating About Dollars*"), 100 Colum. L. Rev. 1139 (2000); *see also How Juries Decide* 43-61.

eration did not moderate the problem of variable dollar punitive awards, but significantly *exacerbated* it. Deliberating juries produced dollar awards significantly *higher* than the awards that their members would have imposed individually, especially at the high end. The deliberative process thus produced a "severity shift" that substantially increased both the magnitude and the unpredictability of dollar punitive awards. *Deliberating About Dollars*, 100 Colum. L. Rev. at 1155-60. The researchers hypothesize that this severity shift comes about because arguing in deliberations for higher dollar awards (on an unbounded scale) is inherently easier than arguing for lower awards (constrained at zero). *Id.* at 1160-62. Whatever the cause, the data make plain that deliberation makes the problem of erratic and unpredictable punitive damage awards worse, not better.

The results of these two studies have important implications on many levels, but several points deserve emphasis. First, the results reveal the shortcomings of a well publicized contention by Professor Eisenberg and colleagues, based on regression analysis of the logarithms of compensatory and punitive damage awards made in a sample of actual cases, that punitive damages are predictable based on the compensatory damage amount.[23] The significance of this contention is debatable, since "predictability" in this sense requires advance knowledge of both the amount of the compensatory damages and the likelihood that punitive damage will be awarded at all, neither of which is known in advance. In fact, the decision to award of punitive damages varied dramatically in the cases studied by Eisenberg et al., ranging from 0% of the cases in some counties to 27% in others. The statistical model used by Eisenberg et al. explains only a

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[23] *See* Theodore Eisenberg, John Goerdt, Brian Ostrum, David Rottman & Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623 (1997).

small fraction of the variation in the probability that juries would award such damages. *How Juries Decide* 245-46.[24]

More fundamentally, the Eisenberg et al. contention is misleading because it focuses exclusively on the *logarithm* of the punitive awards rather than the awards themselves. It is no surprise that the size of compensatory awards can influence the size of punitive awards. But the transformation of dollar values into logarithms serves only to mask the substantial real world variability of the punitive damages awarded for any given level of compensatory damages. Punitive damages are assessed and payable in real dollars, not logarithmic dollars. On a logarithmic scale, a punitive award of $1,000,000 looks only twice as high as an award of $1,000. In the real world, it is 1,000 times higher. *How Juries Decide* 246-47.[25] The cases studied by Eisenberg et al., in fact, exhibit extreme variation in the dollar punitive awards made for any given level of compensatory damages,[26] an observation consistent with statistical analyses of other samples of real world jury verdicts.[27] And that is exactly what the mock jury experiments described above–which found that juries awarded widely varying dollar punitive awards even in identical cases involving identical harms and identical defendants—would predict.

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[24] *See also* W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 Geo. L.J. 381, 384-87 (1998); A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. Legal Stud. 663, 671-74 (1997).

[25] *See also No Defense of Punitive Damages*, 87 Geo. L.J. at 385-86.

[26] For example, the Eisenberg et al. data show that for a compensatory award of $500,000, 5% of the punitive awards would be $10,000 or less, but another 5% would be $6,500,000 or more. *The Predictability of Punitive Damages*, 26 J. Legal Stud. at 657; *Deliberating About Dollars*, 100 Colum. L. Rev. at 1146 n.31.

[27] *See* Jonathan M. Karpoff & John R. Lott Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J.L. & Econ. 527, 571 (1999).

The second important implication of these mock jury studies relates to the so-called "retributive" purpose of punitive damages. Here the experimental results demonstrate the fallacy of claims by retributive theorists that dollar punitive awards meaningfully quantify "community outrage" against corporate misconduct.[28] Although jurors might, if asked to do so, reliably convey the sentiments of the community on a bounded scale, their inability in identical cases to translate shared outrage or punitive intent into predictable dollar awards renders their *dollar* verdicts arbitrary. *Assessing Punitive Damages*, 107 Yale L.J. at 2105-07, 2129. This finding—replicated in two large-scale studies—severely undercuts the traditional defense of punitive damages as a legitimate expression of community sentiment towards particular misconduct. As the authors explain:

> [A] conventional understanding of [punitive damages] awards sees the jury as a sample from the community whose function is to provide an estimate of community sentiment. If jury judgments are erratic, this function is badly compromised, *for any particular jury's judgment may not reflect community sentiment at all.*

Id. at 2105.

B. Jury Awards Do Not, and Cannot, Reflect Any Coherent Theory of Deterrence.

The other justification for punitive damages has always been the need to deter blameworthy conduct. *See, e.g., Gore*, 517 U.S. at 568; *Haslip*, 499 U.S. at 22. Here again, however, the enormous variability of the dollar punitive awards assessed against identical defendants in identical cases belies any suggestion that juries in the ordinary course

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[28] *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393 (1993).

attempt to implement a coherent theory of deterrence. *Assessing Punitive Damages*, 107 Yale L.J. at 2111-12. The experimental results do not rule out, of course, that juries in other settings might focus more systematically on deterrence if encouraged to do so. But additional studies by Professors Sunstein, Kahneman and Schkade and Professor Viscusi cast serious doubt on whether in fact they ever would.

! Under the law-and-economics theory of deterrence, punitive damages should be awarded only if the defendant has a chance of escaping liability. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 874 (1998). For optimal deterrence (including avoidance of overdeterrence),[29] punitive damages should equal the harm the defendant causes multiplied by the reciprocal of the probability that the defendant would not escape liability, less compensatory damages. *Id.*; *see also Gore*, 517 U.S. at 582 (noting that a higher ratio of punitives to compensatories may be justified where injury is hard to detect); *id.* at 592-93 (Breyer, J., concurring) (discussing economic deterrence theory).

In a two-part study designed to assess attitudes about economic deterrence theory,[30] Professors Sunstein, Kahneman and Schkade asked mock jurors to assess punitive damages in personal injury scenarios in which probability of detec-

[29] Overdeterrence is socially undesirable. Among other things, it leads to inefficient resource allocation, inducing companies to spend significantly more on precautions than the risk of harm would justify. Overdeterrence also stifles innovation, discouraging companies from undertaking risky activities, even when potential benefits would substantially outweigh potential costs. *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. at 878-83; W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 299-327 (1998).

[30] Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. Legal Stud. 237 (2000); *see also How Juries Decide* 132-41.

tion—the key variable from the standpoint of optimal deterrence—was varied dramatically. Changes in the probability of detection had no impact on jurors' awards, suggesting that jurors do not spontaneously factor optimal deterrence considerations into their judgments about appropriate punishment. *Do People Want Optimal Deterrence?*, 29 J. Legal Stud. at 241-44. In the second part of their study, the researchers asked law students trained in economic deterrence theory to agree or disagree whether, as that theory would suggest, a tort victim severely injured by egregious misconduct should be barred from recovering punitive damages because the tortfeasor had no chance of escaping detection. The great majority disagreed, suggesting that people may readily reject optimal deterrence considerations in the face of countervailing motivations—such as the desire to punish blameworthy conduct. *Id.* at 244-46.

Professor Viscusi's study[31] tested jurors' ability to implement economic deterrence theory using model jury instructions proposed for that purpose by Professors Polinsky and Shavell. *See Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. at 957-62. The results showed that even with explicit instructions, jurors had difficulty applying the theory correctly and proved insensitive to variables that should have made a difference in its application. *The Challenge of Punitive Damages Mathematics*, 30 J. Legal Stud. at 325-37, 342-44.

We do not suggest that any departure from purely efficient deterrence is improper. *Cf. Cooper Industries*, 532 U.S. at 438. But in *Gore*, the Court held that a large punitive award cannot be justified on deterrence grounds "without considering whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584. The Court's state-

[31] W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. Legal Stud. 313 (2001); *see also How Juries Decide* 142-70.

ment implies that *some* limit on the amount assessed for deterrence must apply. Further, the social costs of overdeterrence are a significant countervailing consideration in many punitive damages cases.[32] Such costs may take on special significance where, as here, the award implicates commercial activities in other jurisdictions, which may take a different view of the defendant's conduct.

If the applicable deterrence principle in a given case involves some other policy choice, the law should in some fashion communicate it to both jurors and defendants. Failure to do so leaves juries at sea, and leaves defendants without notice of the magnitude of potential punishment in violation of *Gore*.[33] From the experimental studies discussed above, we know that juries are unable or unwilling to apply deterrence principles grounded in current economic theory, even when instructed on how to do so. And we know that juries given standard punitive damages instructions—which articulate no particular deterrence principles—assess widely varying awards against identical defendants in identical cases. Thus, it is safe to conclude that juries are indeed at sea on this issue and that their dollar awards do not reflect a consistent or coherent theory of deterrence.

C. Jury Punitive Damage Awards Are Inherently Subject to Arbitrary and Improper Influences.

A final important point from the Sunstein, Kahneman and Schkade studies is that the absence of reliable reference points for translating shared outrage into dollar punitive awards increases the likelihood that arbitrary "anchoring"

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[32] *See, e.g., In re the Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001).

[33] 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

effects and biases of various kinds will distort jurors' awards. Anchoring refers to the natural judgmental process of selecting an initial value (the "anchor") as a starting point from which to arrive at an award by a process of adjustment. Behavioral research shows that the values selected as the anchors often have a disproportionate influence on the outcome of the decision.[34] In the case of punitive damage decisions, which require jurors to map qualitative moral judgments to an unbounded dollar scale with no "modulus," the risk that arbitrary values selected as anchors will distort awards is particularly high. *Assessing Punitive Damages*, 107 Yale L.J. at 2109-10.

A study by Professors Hastie, Schkade and Payne demonstrates that this problem is very real.[35] The researchers presented 375 mock jurors with punitive damages scenarios involving a chemical spill that disrupted a plaintiff's riverside business. To test the potential influence of arbitrary anchor effects, the researchers varied only the dollar amount of punitive damages requested in closing argument by the plaintiff's counsel, holding all other factors (nature of misconduct, amount of harm, size of defendant, etc.) constant. The results showed that the dollar award requested in counsel's argument dramatically influenced the size of the awards jurors actually made, with the median award rising roughly in proportion to the increase in magnitude of the lawyer's re-

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[34] *See* John W. Payne et al., *Behavioral Decision Research: An Overview* 303-59 (1997) (reviewing behavioral literature on anchoring effects); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996) (discussing anchoring effect of plaintiff's *ad damnum* clause on compensatory awards).

[35] Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards* ("*Effects of Plaintiff's Requests and Plaintiff's Identity*"), 23 Law & Hum. Behav. 445 (1999); *see also How Juries Decide* 62-74.

quest. *Effects of Plaintiff's Requests and Plaintiff's Identity*, 23 Law & Hum. Behav. at 463.

Professor Viscusi observed similar anchoring effects in his study testing jurors' ability to assess punitive damages in accordance with instructions on how to compute optimal deterrence values (n.31, *supra*). Jurors' awards increased substantially when case scenarios included a dollar punitive amount requested by plaintiff's counsel, to the detriment of the deterrence computations the instructions sought to encourage. *See The Challenge of Punitive Damages Mathematics*, 30 J. Legal Stud. at 329.

The anchor study by Professors Hastie, Schkade and Payne also tested for another source of arbitrariness in punitive damage awards—bias favoring local plaintiffs. Here the researchers held all factors in the chemical spill scenario constant except the identity of the plaintiff. In one version they identified the plaintiff as a locally owned corporation; in the other the plaintiff became a division of a geographically remote corporation. Mock jurors awarded much higher punitive damages to local plaintiffs, even though the defendant, the misconduct and the harm were the same in all cases. *Effects of Plaintiff's Requests and Plaintiff's Identity*, 23 Law & Hum. Behav. at 449, 466.

Additional studies have identified numerous additional cognitive biases that distort punitive damage awards. Another study by Professors Hastie, Schkade and Payne,[36] for

[36] Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages* ("*Hindsight Effects on Judgments of Liability for Punitive Damages*"), 23 Law & Hum. Behav. 597 (1999). *See also* Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager* ("*What Juries Can't Do Well*"), 40 Ariz. L. Rev. 901 (1998); Reid Hastie & W. Kip Viscusi, *Juries, Hindsight and Punitive Damages Awards: Reply to Richard Lempert*, 51 DePaul L. Rev. 987 (2002) (answering criticisms); *How Juries Decide* 96-108.

example, shows that jurors assessing punitive damages exhibit severe hindsight bias in evaluating the *ex ante* foreseeability of conduct leading to accidents blamed on recklessness. The failure to take precautions that most of one group of mock jurors thought not necessary *ex ante* was deemed reckless—and therefore deserving of punitive damages—by most of a second group of jurors who considered the same factual scenario *ex post*. *Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 Law & Hum. Behav. at 605-07, 609. Similar hindsight effects are common in the behavioral literature,[37] but they appear particularly troublesome in the punitive damages setting. Hindsight bias skews the determination of reprehensibility, potentially distorting both the determination of liability for punitive damages and the decision as to their amount.

Professor Viscusi's work has focused principally on jury attitudes about risk. In a 500-person study designed to measure such attitudes,[38] he found that typical jurors harbor many irrational beliefs about risk that distort punitive awards. Among other things, jurors systematically overestimate small probabilities of bad outcomes, producing exaggerated blame for unlikely accidents and incoherence in judgments under uncertainty. *Jurors, Judges, and the Mistreatment of Risk*, 30 J. Legal Stud. at 111-15, 127-34.[39]

Perhaps the most striking anomaly found by Professor Viscusi in this study concerned jury attitudes towards corpo-

[37] *See, e.g.*, Susan J. Labine & Gary Labine, *Determinations of Negligence and the Hindsight Bias*, 20 Law & Hum. Behav. 501 (1996); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 Law & Hum. Behav. 89 (1995).

[38] W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107 (2001); *see also How Juries Decide* 171-85.

[39] *See also Social Costs of Punitive Damages*, 87 Geo. L.J. at 327-32; *What Juries Can't Do Well*, 40 Ariz. L. Rev. at 909-16.

rate cost-benefit analyses of potential safety precautions.[40] In response to case scenarios designed to test the impact of cost-benefit analysis on the size of punitive awards, jurors awarded much higher punitive damages against companies that undertook cost-benefit analyses than against companies that did not. And when the companies that performed the cost-benefit analyses were liberal in their valuation of potential risks—leading them to take greater precautions—jurors punished them more severely than companies that had underestimated the same risks. *Corporate Risk Analysis*, 52 Stan. L. Rev. at 552-59; *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. at 115-27.

Professor Viscusi also conducted a survey of nearly 100 judges to test their susceptibility to the same sorts of cognitive biases.[41] He found, as one would expect, that judges tend to be significantly more rational than jurors in their evaluation of risk. The judges were not immune from all of the biases that skew juror risk attitudes, but they exhibited them to a considerably lesser degree. No doubt due to their training and experience, judges did a much better job than jurors of putting aside potential biases that might affect their decisions. *How Do Judges Think About Risk?*, 1 Am. Law & Econ. Rev. at 30-51; *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. at 111-15, 127-34.

Finally, with his colleague Joni Hersch, Professor Viscusi recently examined the underpinnings of another claim by Professor Eisenberg and colleagues, this time concerning the

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[40] W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000). *See also Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. at 115-27; *How Juries Decide* 112-31.

[41] W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 Am. Law & Econ. Rev. 26 (1999). *See also Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. at 111-15, 127-34; *What Juries Can't Do Well*, 40 Ariz. L. Rev. at 904-08; *How Juries Decide* 186-207.

propensity of trial judges to award punitive damages in bench trials. Based on a regression analysis of a sample of actual verdicts, Eisenberg et al. contend that trial judges do not exercise significantly greater restraint than juries in awarding punitive damages, but are equally as likely to award them and to assess them in similar amounts. *Juries, Judges, and Punitive Damages*, 87 Cornell L. Rev. at 779.

Doctor Hersch and Professor Viscusi have shown that this claim by Eisenberg et al. is the product of a faulty statistical analysis. *How Judges and Juries Perform*, at 4-6, 30-34.[42] And when the errors made by Eisenberg et al. are corrected, the data tell a different story altogether. Juries are in fact significantly more likely than judges to award punitive damages, and to award them in larger amounts. The jury influence is seen especially in the larger awards, and the variability and unpredictability of the size of punitive awards is much greater for juries than for judges. *Id.* at 10-28. Doctor Hersch and Professor Viscusi also reviewed, for comparison, the very largest (over $100 million) punitive awards made since 1985 (only one of which was captured in the Eisenberg et al. data). They found that juries were responsible for nearly all (98%) of these "blockbuster" awards. *Id.* at 8-10. All of these findings corroborate Professor Viscusi's experimental findings that judges are less susceptible than juries to biases likely to skew punitive damages decisions.

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[42] Specifically, Eisenberg et al. used two jury-related control variables that were highly correlated with one another, and thus masked the significant effect of jury trials on punitive awards. In addition, Eisenberg et al. did not adequately control for the influence of one county (Harris County, Texas) that accounted for a disproportionate number of the judicial punitive awards. *Id.*

II. JURIES ARE UNSUITED TO PUNISH AND REGULATE ALLEGED EXTRATERRITORIAL MISCONDUCT

The foregoing studies show that juries are uniquely unsuited to perform the "institutional" punitive and regulatory task on which the Utah Supreme Court predicated its reinstatement of the extraordinary award in this case. As discussed by Professor George Priest in his introduction to *How Juries Decide*, and elaborated in a recent article by Professor Schkade,[43] juries typically come to the task of assessing punitive damages with no relevant experience. The average citizen's odds of ever sitting on a punitive damages jury are small, and the odds of doing so more than once are miniscule. Relevant knowledge about the parties, the industry or the practices in dispute usually leads to exclusion. "Training" consists only of general instructions about punishment and deterrence of malicious or reckless conduct. Information about the case is provided during the trial, but key information relevant to reasonable punishment—such as information about awards in comparable cases or other applicable sanctions for comparable misconduct—is usually withheld. *Erratic by Design*, 39 Harv. J. on Legis. at 123-32.

Normally, the regulation of insurance business practices in Utah is carried out by the Utah Insurance Commission, an expert body. But in this case the Utah Supreme Court effectively approved the transfer of that responsibility to a lay jury, whose award it upheld as a broad punitive and regulatory measure. Even before consideration of the cognitive difficulties and biases discussed in the preceding section, it would be difficult to imagine a decisionmaker more poorly qualified to be given such responsibility.

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[43] David A. Schkade, *Erratic by Design: A Task Analysis of Punitive Damages Assessment* ("*Erratic by Design*"), 39 Harv. J. on Legis. 121 (2002).

The cognitive difficulties and biases seriously compound the problem. The jury's $145 million award is staggering, but is not in any sense a reliable measure of community outrage. As the studies show, other juries from the same community would likely have produced vastly different awards in response to the same evidence. Moreover, the arbitrary award in this case was likely influenced by the "severity shift" that inflates large awards in deliberation. The studies also show that there is no reason to believe the $145 million award is the product of a coherent deterrence analysis. But there is good reason to suspect it was influenced by various biases the studies have identified, including the "local plaintiff" bias and hindsight bias.[44] In short, the proceedings were a recipe for erratic and unpredictable punishment.

Finally, one must consider that the jury in this case was asked to evaluate not only the specific alleged misconduct affecting the plaintiffs, but also a wide range of other alleged misconduct purportedly committed throughout the nation over a twenty-year period. As stated above, we leave to Petitioner and other *amici* the legal analysis of this problem, which raises serious questions about the permissible reach of state regulation and the risk of excessive and multiple punishments for the same conduct. Our point here is that expanding the authority of a single jury to punish and regulate alleged nationwide insurance practices greatly increases both the risks and costs of error. Juries hear individual bad faith cases every day, but the proceedings here were transformed into a broader inquiry far beyond the jury's competence to conduct. The jury was profoundly unsuited to punish and regulate alleged extraterritorial conduct, and the decision reinstating its attempt to do so should be reversed.

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[44] The decision as to whether State Farm was reasonable in taking to trial a case which ultimately produced an excess verdict, in particular, is one in which hindsight bias could be expected to play a major role.

III. DUE PROCESS REQUIRES SEARCHING REVIEW OF PUNITIVE AWARDS UNDER THE *GORE* GUIDEPOSTS

The studies also make plain that the constitutionality of punitive damages depends on *meaningful* judicial review of the size of punitive damage awards to protect defendants against "lawless, biased, or arbitrary verdict[s]." *Oberg*, 512 U.S. at 433. The studies show that dollar punitive awards made by juries are inherently erratic and unpredictable, unconstrained by either community views of appropriate dollar punishment or coherent deterrence theories, and highly susceptible to arbitrary anchor effects and cognitive biases. Searching review of such awards under the *Gore* guideposts is therefore critical to "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 21. Without such review, neither "fair notice . . . of the severity of the penalty that . . . may [be] impose[d]," *Gore*, 517 U.S. at 574, nor "uniform general treatment of similarly situated persons," *id.* at 587 (Breyer, J., concurring), is possible.

Cooper Industries points the way. As the Court's analysis of the award in that case shows, reviewing courts should ensure that punitive damages are commensurate with the reprehensibility of the *predicate conduct for the award*, the *realistic* harm to the plaintiff, and the *realistic* sanctions that could be imposed for comparable misconduct. 532 U.S. at 441-43. The Utah Supreme Court failed to follow these principles, producing an arbitrary and unconstitutional result and demonstrating that more guidance from this Court is needed. We leave to Petitioner the detailed analysis of the award below under the *Gore* guideposts, but comment briefly on some implications for specific elements of the inquiry.

Reprehensibility. The Utah Supreme Court's reprehensibility analysis focused not on the predicate conduct for the

punitive award (bad faith refusal to settle a third party claim within policy limits), but on a host of dissimilar alleged practices relating to first party claims handling. Pet. App. 17a-24a, 29a. This was improper. Not only did the court ignore State Farm's evidence disproving any pattern of bad faith refusals to settle,[45] but it missed the point of the reprehensibility analysis altogether. Under *Gore*, a reviewing court should compare the particular misconduct that gave rise to the award with other punishable misconduct so as to permit an evaluation of *relative* reprehensibility and a judgment as to the proportionality of the jury's award. 517 U.S. at 575-80. The comparison brings a perspective to the inquiry that a one-time decisionmaking jury wholly lacks, and is an important safeguard against arbitrary awards. The Utah Supreme Court did not undertake such a comparison, which would have shown $145 million to be absurdly out of line as punishment for a bad faith refusal to settle a third party claim.

Other recent decisions have similarly declined to make such comparisons out of misguided deference to the jury. For example, in *Rhone Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335 (Fed. Cir. 2001), *pet. for cert. filed* Jul. 24, 2002, the Federal Circuit upheld a $50 million punitive award despite its acknowledgement that "the facts . . . do not demonstrate any of the criteria enhancing reprehensibility mentioned in *Gore*." *Id.* at 1349. Instead, the court simply assumed that the jury must have determined the defendant's conduct to be highly reprehensible based on its evaluation of the defense witnesses, and held that "independent appellate review [was therefore] essentially meaningless." *Id.* at 1348. The court's reasoning is exactly backwards. If a jury awards large punitive damages for conduct

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[45] According to State Farm's evidence, over the 15 year period preceding suit, it settled or obtained dismissal of virtually all third party claims brought against its insureds in Utah and lost excess verdicts in less than 2% of the small number of cases it took to trial. Pet. at 5-6.

that lacks objective criteria of high reprehensibility as set forth in *Gore*, the award is likely out of line. Courts should not infer from the size of an award that the jury must have made an unspoken (and unreviewable) determination of high reprehensibility. As the studies show, a high dollar award is not a reliable measure of reprehensibility. Juries make widely varying dollar awards for conduct they rate as equally blameworthy because they lack a common basis for translating blameworthiness into dollars.

Ratio of Punitive Damages to Harm. The Utah Supreme obviously understood that the 145 to 1 ratio of punitive to compensatory damages exceeded by orders of magnitude the 4 to 1 ratio described as "close to the line" in *Haslip*, 499 U.S. at 23, and the 10 to 1 ratio upheld in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). Yet it misdescribed the relevant *Haslip* and *TXO* ratios as 200 to 1 and 526 to 1, Pet. App. 30a, and then purported to defend the outsized $145 million award as appropriate for deterrence of future misconduct and punishment of assumed harm to other insureds. Pet. App. 29a-34a. None of this analysis holds up. The deterrence arguments are transparent makeweight,[46] and the reliance on alleged harm to others violates the directive in *Cooper Industries* that the relevant inquiry is "the relationship between the penalty and the *harm to the victim* caused by the defendant's actions." 532 U.S. at 435 (emphasis added).

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[46] Among other things, the court cited a non-existent trial court finding that State Farm "will be punished at most in one out of every 50,000 cases as a matter of statistical probability," a never-entered $100 million for unspecified conduct in another state, and an assertion that "[m]any large corporations are 'entities too powerful to be constrained' by remedies provided by 'criminal and civil law.'" Pet. App 30a-32a (quoting Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1329-30 & n.299 (1993)). Plainly, much more is needed to support a $145 million award.

The studies strongly attest to the importance of meaningful application of the reasonable ratio requirement. They show that juries are poor risk managers, do not engage in coherent deterrence analysis, and ultimately make erratic and unpredictable awards. The ratio inquiry, like the reprehensibility inquiry, provides an important means by which reviewing courts, taking a broader view than the one-time jury, can compare the award under review with other awards to ensure that the amount is reasonably proportionate to the harm to the plaintiff and to protect the defendant against the potential for multiple punishment. The Utah Supreme Court simply dispensed with these aspects of the inquiry.

Other recent decisions have made the same error. In its recent *Romo* decision (*supra* n.9) reinstating a jury's $290 million punitive award in a products liability case arising from a fatal automobile accident, the California Court of Appeal never even mentioned the 58 to 1 ratio of punitive to compensatory damages. Instead it dismissed the ratio inquiry with the observation that in cases involving fatalities, damages underestimate harm. 99 Cal. App. 4th at 1147, 1151. The court's approach nullifies the second *Gore* factor in fatality cases, inviting arbitrary overpunishment in a category of cases where the cognitive difficulties and biases discussed above are likely to be especially problematic.

Sanctions for Comparable Misconduct. The third *Gore* guidepost is especially significant because it provides a way for courts to bring otherwise arbitrary jury awards into line with generally applicable sanctions for comparable wrongs. But again the Utah Supreme Court rendered the guidepost meaningless. Dismissing the only readily comparable sanction—a $10,000 fine under Utah's Unfair Claims Practices Act for defrauding the plaintiffs—the court instead focused on hypothetical multiple penalties for alleged harm to others or wildly unlikely penalties such as debarment by the Utah Insurance Commission, disgorgement of all profits, or jailing

of officers. Pet. App. 34a-37a. The court in *Romo* treated this factor similarly, asserting summarily that Ford could be convicted of criminal manslaughter for which individuals could be sent to prison. 99 Cal. App. 4th at 1148, 1151. Neither decision comports with *Cooper Industries*, which makes clear that reviewing courts should focus on comparable penalties that might realistically be imposed for the conduct that harmed the plaintiff. 532 U.S. at 442-43.

In the same vein, courts certainly should not be precluded, as the Utah court held, from measuring the award against fines assessed in actual practice as distinguished from hypothetical (and unlikely) statutory maximums. The comparison should be to sanctions that a defendant would reasonably anticipate, and actual administrative practice is presumptively the best measure.[47] The studies strongly support this view. Since dollar punitive awards by juries are arbitrary, reviewing courts should not assume that a high award should equate to a maximum fine, but should give greatest weight to the fine that the defendant would most likely receive.

CONCLUSION

For all the reasons stated above, this Court should vacate or remit the $145 million punitive damage award in this case.

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[47] *See Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999) (penalties likely to be imposed); *In re Exxon Valdez*, 270 F.3d at 1245-46 (penalties actually imposed).

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